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ATTORNEYS FOR SIERRA PACIFIC RESOURCES
APPLYING FOR ADMISSION PRO HAC VICE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

Coordination Proceeding Special Title (Rule 1550(b))

NATURAL GAS ANTI-TRUST CASES I, II, III & IV

[*This Document Relates to the Pipeline Cases and Price Reporting Class Action Cases*]

J.C.C.P. Nos. 4221, 4224, 4226 and 4228

REPLY IN SUPPORT OF MOTION TO CORRECT JUDGMENT FOR CLERICAL ERROR OR IN THE ALTERNATIVE MOTION TO AMEND AND/OR VACATE JUDGMENT PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 473, SECTION 663 OR BY WRIT OF CORAM NOBIS BY SIERRA PACIFIC RESOURCES, ET AL.

Date: September 8, 2006
Time: 10:00 a.m.
Dept 71

Coordination Trial Judge: Hon. Ronald S. Prager

I. INTRODUCTION

Sempra's reply does not dispute the following arguments from Sierra Pacific Resources' original motion:

1. Sierra Pacific Resources does not fit the definition of the class;
2. None of Sierra Pacific Resources' 34 subsidiaries and affiliates fit the definition of a class member;
3. Sempra has never submitted any evidence to this Court that Sierra Pacific or even one of the 34 affiliates fits the definition of a class member;
4. Sempra has never made any motion, filed any brief or made any request of this Court to determine that Sierra Pacific or even one of the 34 affiliates fits the definition of class member;
5. The ambiguous language in paragraph 12 is not within this Court's original order approving the class certification and settlement agreement;
6. Such language is not within the Settlement Agreement;
7. Such language is not within any notice to the class;
8. Such language is not within any letter by Sempra counsel (Sempra's May 15, 2006 letter only addressed the question of whether the opt-out by Sierra Pacific Resources "appear[ed]" effective).

Sempra makes two arguments against Sierra Pacific's motion:

1. This Court lacks jurisdiction
2. Sierra Pacific delayed too long in requesting relief.

Both arguments are mistaken.

II. DISCUSSION.

A. This Court Has Jurisdiction

Sempra does not dispute that this Court has jurisdiction to correct clerical errors. Sierra Pacific cited a number of cases in its initial motion that clearly hold that the trial court retains such jurisdiction and Sempra does not dispute the holdings of these cases. *Makovsky v. Makovsky*, 158 Cal.App.2d 738, 742 - 3, 323 P.2d 562 (Cal.App.1st 1958) (rejecting the

argument that the trial court was "without jurisdiction" to correct its findings of fact; "**The pendency of an appeal does not destroy the power of a court to make such correction** ...") (emphasis added); *see also People v. Mitchell*, 26 Cal.4th 181, 185 26 P.3d 1040 (2001), *quoting In re Candelario (1970)*, 3 Cal.3d 702, 705, 91 Cal.Rptr. 497, 477 P.2d 729 ("It is not open to question that a court has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts...**The power is unaffected by the pendency of an appeal or a habeas corpus proceeding**.") (emphasis added); *Crawford v. Meadows*, 55 Cal.App. 4, 11 - 13, 203 P. 428 (Cal.App.2d 1921) (same).

1. This Court has jurisdiction to correct the clerical error in paragraph 12 (clarifying an ambiguity) through the insertion of one word.

This Court's final judgment entered on July 20, 2006 held that late exclusion requests were ineffective (p. 8, 12). However, the judgment goes further and uses ambiguous language which could be read to indicate that the Court was actually determining that those specific persons were within the class definition. Paragraph 12 of the judgment currently states that the persons seeking exclusion "**were already members**" and "**were already class members**". (emphasis added). Sierra Pacific's motion first seeks to clarify this ambiguity through the addition of one word and thus indicate that this Court is not making any determination that Sierra Pacific is (or is not) within the detailed class definition.

Although Sempra admits that this Court has jurisdiction to correct clerical errors, Sempra argues that the request for the insertion of one word ("potential") is not the correction of a clerical error. Sempra, while refusing to admit that any error exists, argues that any error would be a "judicial error" because it is "the result of the exercise of the judicial function." Sempra Brief at 5.

The basis for Sempra's conclusion that the ambiguity in paragraph 12 is "the result of the exercise of the judicial function" is that the Court entered the final judgment without change from the proposed final judgment. This proves nothing. The California Appellate Courts have expressly ruled that a trial court's approval of an order submitted by counsel can be a clerical error. *Russell v. The Superior Court of Placer Co.*, 252 Cal.App.2d 1; 59 Cal.Rptr. 891 (3rd

App. 1967) (finding that an error and ambiguity in a divorce decree submitted by the husband's attorney and entered exactly by the trial court was a clerical error that could be revised by the trial court).

Sempra then appears to argue that a clerical error can only be in the actual transcription of the judgment document and argues that the proposed change "would change the description of a whole group of persons and materially affect the rights of the parties under the settlement." This is incorrect. First, the test is not whether a clerk made a typographical mistaken. The test is whether the judgment reflects the Court's intent. Again, the *Russell* case is helpful. There, the Court explained that: "The **understanding of the court**, not that of the parties, **is the determinative factor**." *Id.* at 12 (emphasis added).

Sempra cites *Aspen International Capital Corp. v. Marsch*, 235 Cal.App.3d 1199, 286 Cal.Rptr. 921 (4th App. 1991) for its apparent argument that a clerical error is only a transcription error. *Aspen*, however, expressly allowed an amendment which was far broader than Sierra Pacific's request. There, the court found that the failure to include in the judgment a provision allowing for the recovery of attorney fees and costs was merely clerical. Clearly, such a change was not merely a typographical or transcription error.[1] It was an error in the expression of the intent of the trial judge. As the *Aspen* court explained:

[1] *See also Ames v. Paley*, 89 Cal.App.4th 668, 107 Cal.Rptr. 515 (2nd App. 2001) (clerical error corrected because provision in settlement agreement was not correctly included within final judgment); *Russ v. Smith*, 264 Cal.App.2d 385, 70 Cal.Rptr. 813 (4th App. 1968) (clerical error corrected through revising a license revocation order and adding another license number to the order because it was "implicit" in the original order although not stated); *Pettigrew v. Rent-A-Car*, 154 Cal.App.3d 204, 201 Cal.Rptr. 125 (3rd App. 1984) (clerical error corrected to reduce judgment from $150,000 to $15,000 because appeallate court must assume that any award contrary to the damage cap was due to inadvertence).

> A correctable clerical error includes one made by the court which **cannot reasonably be attributed to the exercise of judicial consideration or discretion**.... The term "clerical error" covers all errors, mistakes, or omissions which are not the result of the exercise of the judicial function.

Id. at 1205 (emphasis added).

Here, to the extent that paragraph 12 could construed to state that Sierra Pacific is a "class member," such a determination "cannot reasonably be attributed to the exercise of judicial consideration or discretion." There was no evidence submitted on this point. There was no request for a determination. It was not part of the Order issued by this Court approving the settlement agreement. It was not part of the settlement agreement.

Because it was never considered by the Court (since nobody asked the Court to consider it), it cannot reasonably be attributed to the exercise of judicial consideration.

The *Aspen* court also explained that the purpose of the Court's power to correct clerical error is "to conform its records to the truth." *Id.* at 1204. That is exactly what Sierra Pacific is requesting. The "truth" is that neither Sierra Pacific nor its affiliates are within the class definition and nobody has submitted any evidence so asserting. The "truth" is that there is a detailed class definition and merely submitting an opt-out request does not transform a person into a class member.[2]

Sempra is likewise mistaken that the proposed change would "materially affect the rights of the parties under the settlement." The change would instead **conform** the judgment to the settlement, conform it to the notice, conform it to the evidence, and conform it to this Court's June 27, 2006 Order approving the settlement. In *Russell*, the Court explained:

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[2] Sempra repeatedly argues that Sierra Pacific is relying upon the Court's "inherent" authority to correct clerical mistakes. Sempra is correct and the cases repeatedly state that the Courts have such inherent authority. However, Cal.Code of Civ. Proc. § 473 (d) also expressly provides this authority to correct clerical errors.

For the purposes of this case all we need to, and do, rule is that "a clerical mistake" includes an ambiguous provision in a decree seemingly changing from the positive to the permissive that which was **actually agreed to and ordered in open court**.

> Actually the mistake was not that of the judge. The mistake was that of the draftsman of the decree - the husband's lawyer. In these times busy judges must of necessity rely heavily upon the attorneys to prepare orders and judgments **accurately so that they express that which was done at the trial and that which the judge had called for**.

Id. at 12 (emphasis added).

Here, what was "actually agreed to" is the settlement agreement. The settlement agreement includes a specific, carefully negotiated, detailed, definition of the class. The ambiguity in the final judgment cold be read to ignore the limitations in the class definition and simply declare that persons who allegedly opt-out late are "class members." A person is not transformed into a class member - when they were never a class member - simply because they attempt to opt-out of the class.

Certainly what was "actually agreed to" does not include ignoring the class definition. Declaring Sierra Pacific a class member is not in any evidence submitted to this Court, the settlement agreement, the notice, or even any pleading submitted to the Court (other than the draft final judgment).

Likewise, what was "ordered in open court" is this Court's June 27, 2006 Order approving the settlement and directing the preparation by counsel of an order "in accordance" with the ruling approving "the class action settlement." Again, the order includes the specific, detailed definition of the class and does not include transforming everyone who filed an allegedly late opt-out to be within the class definition.

Sempra is not attempting to maintain what it "actually agreed to." Sempra is trying to gain something that was never agreed to, never negotiated for, never submitted for decision to this Court, never part of the class action, and contrary to the settlement agreement.

The *Russell* case also explains that a clerical mistake can include "an ambiguity". *Id.* at 9, 12. Paragraph 12 appears to qualify. On the one hand, paragraph 12 does not expressly consider whether Sierra Pacific or anyone else that allegedly filed late opt-out requests are within the class definition. Nevertheless, paragraph 12 uses the words "class members." The addition of the word "potential" clarifies this ambiguity to make clear what the parties and the Court intended - that the allegedly late opt-out was not effective as an opt-out.[3]

2. This Court also has jurisdiction to correct the clerical error in the ministerial listing of persons who failed to opt-out earlier.

Exhibit C to the Judgment lists the parties that allegedly opted out late. This listing was, in effect, a ministerial listing by the settlement administrator. The record shows no submission of any evidence to this Court to support this ministerial listing. The ministerial listing is simply wrong - because Sierra Pacific actually filed with this Court, in the record, an opt-out request before the deadline for such requests. Ironically, the only record evidence in this matter as to whether Sierra Pacific timely requested exclusion is the exclusion request by Sierra Pacific. There is no record evidence that it filed late. None.

Because this Court did not consider exactly which persons had opted out timely and relied upon the submission of the draft order, correction of Exhibit C to indicate that Sierra Pacific did opt-out timely is merely the correction of a clerical error - something that this Court undeniably has jurisdiction to do. This situation is akin to the situation in *Russell v. The Superior Court of Placer Co.*, 252 Cal.App.2d 1; 59 Cal.Rptr. 891 (3rd App. 1967). There, the husband's attorney drafted a proposed judgment that the Court entered - but it was contrary to

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[3]At one point in its brief, Sempra states that Sierra Pacific is requesting the addition of the word "proposed." This is untrue. Sierra Pacific is merely requesting the clarification in paragraph 12 that the listed parties are "potential" class members - thus making it clear that the Court has made no determination.

the intent of the Court. The Court agreed that this was a clerical mistake and could be corrected. Here, the listing of which parties filed late exclusion requests is the same. The Court intended to invalidate only those exclusion requests that had been filed late and depended upon a scrivener to provide that list.[4] *See also Aspen*, 235 Cal.App. at 1204 (difference between clerical error and judicial error is "whether it was the deliberate result of judicial reasoning and determination").

This Court therefore has jurisdiction to revise Exhibit C to indicate the Sierra Pacific did timely request exclusion.[5]

B. SIERRA PACIFIC DID NOT DELAY TOO LONG IN REQUESTING RELIEF.

1. Sierra Pacific did not delay too long in requesting correction of the ambiguity in paragraph 12.

Sempra argues that Sierra Pacific delayed too long before requesting correction of the ambiguity in paragraph 12, citing (1) the Court's January 17, 2006 order, (2) a letter written in

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[4] Sempra does not dispute that the exclusion request filed by Sierra Pacific was before the deadline for such exclusion requests. Sempra does not dispute that the wording of the exclusion request was sufficient to opt-out of all classes in this Action. Sempra does not dispute that the exclusion request was filed after the "Sempra" class was certified. Sempra does not dispute that the exclusion request was properly filed with this Court. Sempra does not dispute that it was served upon the El Paso settlement administrator (who is the same administrator as the "Sempra" settlement administrator). Sempra does claim that because it was not served upon Sempra's counsel, that the request was not intended to cover the "Sempra" class; however, the wording of the exclusion request is unambiguous.

[5] To the extent that this Court determines that the request to revise Exhibit C (or the request to clarify the ambiguity in paragraph 12) are not clerical errors but may be "judicial errors" and therefore jurisdiction might not exist to rule on such motions because of the automatic stay provision of § 916, Sierra Pacific requests that this Court stay its decision on this portion of the motion until such time as the appeal is decided. *See, e.g., Betz v. Pankow* (1993) 16 Cal.App.4th 931, 941, 20 Cal.Rptr.2d 841 (agreeing that trial court was without jurisdiction to rule on a motion to vacate [not a clerical error] while an appeal was pending, and that "upon issuance of our remittitur the trial court will regain jurisdiction to entertain [Betz's] petition to vacate the judgment and award").

May by Sempra's counsel, and (3) the service of the proposed judgment upon Sierra Pacific counsel.

Sempra cites no authority - that is no cases, no statutes, no court rules - to support its delay argument. For this reason, alone, this argument should be ignored.

Sempra's argument is also factually mistaken. First, the January 17, 2006 order did not decide that the limitations in the class definition should be ignored. The order did not declare (because it is not true) that a person is transformed into a class member - when they were never a class member - simply because they attempt to opt-out of the class. Sierra Pacific therefore had no error to bring to this Court in January, 2006. Notably, a careful reading of Sempra's brief shows that Sempra does not even argue that the January, 2006 order somehow placed a duty upon Sierra Pacific to complain of the ambiguity in paragraph 12 of the final order.

Next, Sempra argues that the May letter it wrote to Sierra Pacific counsel meant that Sierra Pacific should have objected in May. Again, the May letter contains no statement that Sierra Pacific and its affiliates are "class members." The letter has no hint that the final judgment (or any order for that matter) would include an ambiguity that could be construed to declare that a person becomes a class member - when they were never a class member - simply because they attempt to opt-out of the class. Instead this letter merely states Sempra's position that Sierra Pacific's attempt to opt-out "appears to be ineffective." *See* Cook Aff. Ex. F (May 15, 2006 letter stating that "Sierra Pacific entities' attempt to opt-out of the Sempra settlement classes, therefore appears to be ineffective"). Even if the May letter had contained the ambiguity, Sierra Pacific would not have an objection to bring to this Court in May. The operative documents (the settlement agreement and the notice) were not objectionable in May (or now) and thus there would have been nothing for Sierra Pacific to protest.

Finally, Sempra faults Sierra Pacific for not objecting to the proposed final judgment before it was entered. Notably, Sempra does not dispute any of the facts recited in Sierra Pacific's motion or the attached Cook affidavit which explain in detail the reasons for the delay. Sierra Pacific did not receive the proposed judgment until July 14, 2006 (Cook Aff., Ex. H (page with date stamp on date of receipt by Cook Assistant)). This was seven (7) days before

entry of the final judgment and was during the vacation of Sierra Pacific's counsel. On the very first day back in the office, Sierra Pacific's counsel took action. *See generally* Cook Aff.

Sempra can cite no case (because there most certainly are none) which holds that seven (7) days bars a motion to correct a clerical mistake. In fact, Sempra's counsel delayed over a week in even responding to repeated communications from Sierra Pacific's counsel immediately after the judgment (although promising to speak with Sierra Pacific counsel) - during which time an objector filed an appeal. Notably, Sempra's counsel wrote their response the day after the appeal was filed.

2. Sierra Pacific did not delay too long in requesting correction of Exhibit C.

Sempra makes the same delay arguments regarding the correction of Exhibit C. Again, Sempra cites no authority. Again, the January, 2006 order includes no mistaken list of late exclusion requests.

Sempra is correct that it raised the alleged late exclusion request in its May, 2006 letter. Sempra is wrong that this meant that Sierra Pacific had an affirmative obligation to file an objection and raise the issue with this Court. Sierra Pacific had not appeared in this Court. Sierra Pacific had every right to raise the question of whether its exclusion request was late - **if** Sempra ever attempted to use the class action as res judicata. The issue might never arise. Sempra did not state that it was going to request that this Court find that Sierra Pacific (or its 34 affiliates) opted out late (something that Sempra apparently never actually did). In fact, the Sempra letter could be read to imply that the Court will make no findings and that Sempra will not ask for such a listing. All that the letter states is that the opt-out "appears to be ineffective."

III. CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Sierra Pacific respectfully requests (1) that this Honorable Court correct the final judgment issued to correct the ambiguity in paragraph 12 and (2) that this Honorable Court correct Exhibit C to reflect that Sierra Pacific did exclude itself from the Class through its express request filed with this Court in 2003.

August 31, 2006

One of the Attorneys for the Above
Sierra Pacific Resources and Affiliates
Listed on Exhibit 1

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